

In the Matter of)
 FeatureGroup IP)
 Petition for Forbearance Pursuant to) WC Docket No. 07-256
 47 U.S.C. §160(c) from Enforcement)
 of 47 U.S.C. § 251(g), Rule 51.701(b)(1),)
 and Rule 69.5(b))

IN SUPPORT OF THE FEATUREGROUP IP FORBEARANCE PETITION

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Dated: March 14, 2008

EXECUTIVE SUMMARY

In these Reply Comments, FeatureGroup IP addresses the misunderstandings, misconceptions and mischaracterizations set forth in the initial comments of parties responding to FeatureGroup IP's Petition for Forbearance in the above captioned proceeding.

Several commenters are critical of FeatureGroup IP's effort to use the FCC's forbearance process to ensure that providers and users of voice-embedded Internet communications are not subjected to the highest intercarrier compensation rate at the sole discretion of the consumer-controlling access provider. These Reply Comments address this issue in great detail below, most importantly noting that the critical commentators mischaracterize FeatureGroup IP as an IXC, an "Enhanced Services Provider" or an "Interconnected VoIP provider," rather than a competitive local exchange carrier (CLEC) with a filed tariff offering telephone exchange and exchange access services to new-technology users and non-carrier enhanced/information service providers, and with the right to interconnect with other LECs for the exchange of traffic. The reason so many incumbents have lined up to try and prevent granting of our request for Forbearance is very simple: they are afraid that 21st century business models, based on Internet technology and user choice, will compete with and be substitutable with 20th century content delivery business models like ordinary telephone service and ordinary cable TV. It's about competition. In the Internet world,

the traditional barriers to entry and competition created by scale and scope dissipate due to the distributed nature of investment by users and the ability of our customers, who are not legacy carriers, to develop smarter systems and technologies that are simply better. All we ask is that when we are fulfilling our role as an LEC and attempting to compete with ILECs that we not be required to PAY our direct competitor non-cost based fees to signal, originate or terminate telephone exchange or exchange access traffic when the two networks must collaborate to complete a call. We believe that this is an explicit right conveyed to us through the 1996 Telecommunications Act.

FeatureGroup IP acknowledges that there have been numerous proceedings at the FCC going back more than a decade that could have adequately resolved FeatureGroup IP's immediate and prospective concerns. There, however, has been no dispositive action from the Commission on this matter and American consumers are the poorer for it. Every time the FCC has taken action on intercarrier compensation, it has essentially piece-parted the regime to close perceived "arbitration plays" by would-be competitors, while failing to recognize the ongoing "arbitration plays" perpetrated by the ILECs themselves. The end result is that ILECs always remain net recipients of intercarrier compensation flows, and the FCC has yet to move away, once and for all, from the 251(g) access charge regime that was only intended to be a temporary measure while the FCC established the rules ensuring a fair and sustainable competitive telecommunications market with

multiple players, rather than a government-sanctioned monopoly. Thus, FeatureGroup IP's decision to use the forbearance route grows out of many years of frustration and efforts to develop reasonable interconnection with the LECs.

Even those critical of FeatureGroup IP's approach to resolution tend to support FeatureGroup IP's ultimate goal – to ensure that Internet-based communications can evolve and grow to the fullest and most rapid extent possible without any intervening provider from curb its growth and evolution. As discussed *infra*, forbearance is appropriate and necessary in this case.

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Appendix C: Letter from Lowell Feldman to Joe Douglas, VP, Government Relations, National Exchange Carrier Association, dated January 15, 2008

Appendix D: Letter from Joe Douglas, VP, National Exchange Carrier Association, to Lowell Feldman, CEO, FeatureGroup IP dated January 28, 2008

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
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47 U.S.C. §160(c) from Enforcement)	
of 47 U.S.C. § 251(g), Rule <u>51.701(b)(1)</u> ,)		
and Rule 69.5(b))	

REPLY COMMENTS OF FEATUREGROUP IP
IN SUPPORT OF THE FEATUREGROUP IP FORBEARANCE PETITION

I. Introduction

FeatureGroup IP submits these Reply Comments in support of its
Petition for Forbearance (Petition) in the above captioned proceeding.¹

FeatureGroup IP was particularly pleased and hopeful when the FCC
opted to hold a *Public En Banc Hearing in Cambridge, Massachusetts on
Broadband Network Management Practices* at Harvard Law School on
February 25, 2008.²

The testimony from several Internet entrepreneurs and innovators and
noted academics were remarkably germane to the issues raised in the

¹ For a discussion of FeatureGroup IP's opposition of the corollary Embarq Petition, as well as the NECA Petition for Interim Relief filed in CC Docket No. 01-92, *see* FeatureGroup IP Comments, *In the Matter of Embarq Local Operating Companies Petition for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C § 251(b), and Commission Orders on the ESP Exemption*, filed in CC Docket No. 01-92 and WC Docket No. 08-8, attached hereto as Appendix A.

² http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280373A1.pdf.

FeatureGroup IP Petition, particularly the comments of Professor Yochai Benkler and his recognition that “the Internet is overwhelmingly about users connecting to each other, not providers connecting to audiences.” As Professor Benkler stated:

Once you stop looking through the blinders of people trained in 20th Century business models, the Internet is about people connecting to each other, to chat about the silly and the profound, to create together and to organize, to transact and to tell each other stories about who we are and how our lives might become. Organizations whose history and culture are based in content delivery to audiences or delivery of well-specified services to terminals are going to have a very hard time understanding that this is where the future lies. They will only do so under the pressure of genuine open competition, which will force them either to understand this change or get out of the way.³

While Professor Benkler pointed specifically to concerns over Comcast’s alleged degrading of access by end-users to peer-to-peer BitTorrent applications, his analysis could not be more apt than in consideration of the activities of the ILECs treatment of narrowband consumer access to voice-embedded Internet applications and consumers’ ability to participate in more robust, holistic communications and group forming networks. The self-help mechanisms used by the ILECs to extract the highest intercarrier compensation conceivable when an end-user relegated to the PSTN wants to participate in an Internet-based communication that may include a voice component do nothing to advance the Internet, communications, consumer

³ Testimony of Professor Yochai Benkler at FCC’s *Public En Banc Hearing in Cambridge, Massachusetts on Broadband Network Management Practices* public forum at Harvard Law School at 1:11:40 -1:13:21 (February 25, 2008) (available through video and audio feed on the FCC Website at <http://www.fcc.gov/realaudio/agendameetings.html>).

welfare or the public good, beyond the short-term lining of the pockets of the ILECs and their shareholders.

The FCC has the opportunity, by granting the FeatureGroup IP Forbearance Petition, to ensure that the arbitrage game that the ILECs are perpetrating – extracting supra-competitive compensation from those who compete with the ILECs in the business of intermediating the Internet with the PSTN – do not stifle the growth and evolution of Internet-enabled communications. The FCC has the opportunity in this case to ensure that consumers may obtain maximum value derived from group forming networks and the network effects that may only be achieved when users of each network – including those relegated to the limited-functioning, narrowband off-ramp on the network of networks – are allowed to participate across networks without any intervening gatekeeper using its excessive market power or control over an access facility to game the system and extract supra-competitive compensation from consumers, other providers or their direct competitors.

FeatureGroup IP notes that it is encouraged to see organizations like the Open Internet Coalition and Google, and other policy thought-leaders for the Internet application innovators and entrepreneurs becoming actively engaged in the complex debates over the proper approach to pricing interconnection between telecommunications providers. Internet communications entrepreneurs and users have unfortunately become

collateral damage in the wars over compensation that have waged for more than ten years between telecommunications carriers in efforts to extract as much inter-carrier revenue from one another as possible, often at the expense of the consumer and the greater economic and social good. As the Open Internet Coalition and Google point out, extending access charges to voice-embedded Internet communications services would stifle innovation and economic growth, disserve consumers and harm competition in multiple markets.⁴ Most notably, such an approach would stifle click-to-call and other emerging and innovative and beneficial IP to PSTN applications.⁵

FeatureGroup IP agrees with the comments of PointOne, which argues that IP to PSTN VoIP traffic properly falls under the Commission's Enhanced Service Provider (ESP) Exemption.⁶ Although not supportive of a forbearance approach, Global Crossing also argues that Interconnected VoIP providers are logically included within the ESP exemption.⁷ The ESP exemption prevents access charges from being applied to any traffic to or from an ESP's facilities unless the ESP is purchasing a telephone toll service as an end user. The problem here is that the LECs generally refuse to recognize this proposition, and unless and until there is a clear statement from the Commission to this effect, this conclusion has no practical, positive effect on PSTN-Internet interconnection. Meanwhile, the ILECs feel they

⁴ OIC Comments *passim*; Google Comments at 4-7.

⁵ OIC Comments at 19-20.

⁶ PointOne Comments at 4-7.

⁷ See, e.g., Global Crossing Comments at 5-8.

have no compulsion and no incentive to recognize or even bargain around it. Because the LECs have access to the stranded consumer, Internet-based voice application providers and the carriers that connect them to the LECs' narrowband networks remain captive to the usurious rents unilaterally imposed by the LEC that controls access to the customer.

FeatureGroup IP argues below that forbearance is an acceptable mechanism in this case, even in the absence of a clear FCC designation on the nature of Interconnected VoIP traffic as either a “telecommunications service” or “information service.” FeatureGroup IP comes before this Commission requesting, as a CLEC, the FCC to grant its request for forbearance so that it may adequately service its new technology and enhanced/information service provider customers and compete with the incumbents. FeatureGroup IP views this Petition as a necessary vehicle to ensure the growth and evolution of Internet-based communications.

Although several CLEC commentators do not explicitly support FeatureGroup IP's forbearance approach (because of a misunderstanding over the nature of FeatureGroup IP and the services it offers), they recognize that the current intercarrier compensation regime is unsustainable and discourages deployment of innovative, integrated Internet communications applications, particularly applications with an embedded voice component.⁸

⁸ See, e.g., PAETEC Comments *passim*.

The critical commentators have failed to recognize that FeatureGroup IP is not an “IXC,” “Enhanced Service Provider” or “Interconnected VoIP Provider.” Therefore, the criticisms that FeatureGroup IP is not in a position to seek the requested forbearance are incorrect. FeatureGroup IP is functioning as a “telecommunications provider.” In fact, all of the FeatureGroup IP entities are CLECs, providing, pursuant to a filed tariff, only telephone exchange or exchange access service to new-technology users and non-carrier enhanced/information service providers seeking intermediation between the Internet and the narrowband PSTN. Thus, the suggestion that forbearance cannot apply to FeatureGroup IP because it is not a “telecommunications provider” is wrong.⁹

By way of final introductory remarks, FeatureGroup IP must point out that it has tried to engage the ILECs and their associations – most notably Embarq, NECA, and AT&T – to negotiate a reasonable method of interconnection,¹⁰ but they have expressed no interest in engaging in good faith negotiations.¹¹ Simply put, they want to charge the highest access rate imaginable for as long as they maintain control over the captive users of the

⁹ See *infra*, Section II.

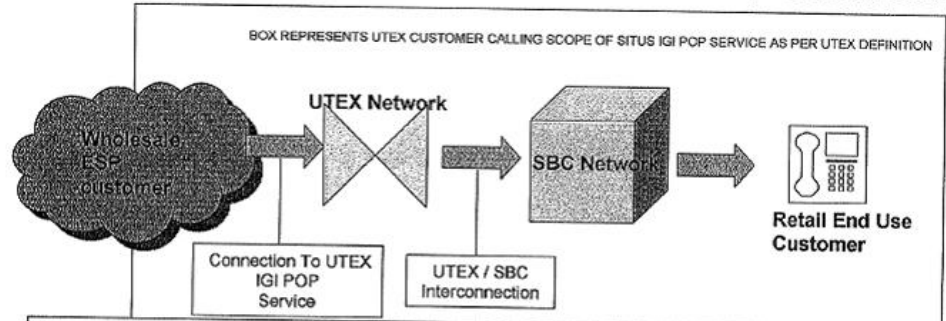
¹⁰ See, e.g., Letter from Lowell Feldman, CEO, FeatureGroup IP to Jeffrey S. Lanning, David C. Bartlett and John E. Benedict, Embarq, dated February 14, 2008 (attached hereto as Appendix B), Letter from Lowell Feldman to Joe Douglas, VP, Government Relations, National Exchange Carrier Association, dated January 15, 2008 (attached hereto as Appendix C).

¹¹ See Letter from Joe Douglas, VP, National Exchange Carrier Association, to Lowell Feldman, CEO, FeatureGroup IP dated January 28, 2008 (attached hereto as Appendix D). Embarq did not provide a written response.

PSTN and for as long as regulators turn a blind eye to this usurious, anti-consumer, anti-innovation LEC business practice.

FeatureGroup IP has every right, like every other certificated LEC to negotiate fair interconnection with other LECs. Years ago, FeatureGroup IP created a series of “call flow” diagrams in an attempt to obtain either negotiated or arbitrated guidance on how its traffic should be signaled, routed and rated when two LECs are involved at the originating or terminating end of a call session. These call flow diagrams were presented to AT&T, which refused to even discuss the issue. The Texas PUC decided to abate the replacement agreement arbitration over FeatureGroup IP’s objection, so regulatory guidance has not been possible either. Despite our multiple efforts over several years FeatureGroup IP has been completely unable to obtain any resolution on the issue. The only alternative to not entering the market (or exiting the market) was to implement our own best estimation of the proper manner to signal and route this traffic, and to dispute AT&T’s and the other ILECs’ unilateral switched access rating decisions.

Call Flow 1: IGI POP Customer to SBC Customer



Call Flow Question	Call Flow Answer
How are calls routed between UTEX and SBC?	
How are calls treated for rating purposes? If calls are interexchange access, how are third parties identified and billed? How is compensation collected and distributed?	
What does the ICA require each party to include in each parameter and/or field of the SS7 ISUP IAM for calls between the two LEC networks?	

Does the nature of the device or platform matter, such as if it is hosted IP Centrex, a hosted IP based ATA Service (e.g. Vonage, Sun Rocket), a hosted bundled Cable Modem service (e.g. Comcast, Time Warner Cable), a wireless IP service (the soon to be Google IP Phone), an IP PBX (3 Com, Cisco, NorTel, etc), an Instant Message platform with Voice (such as Google Talk, Yahoo Voice, Microsoft, Skype), an IP collaboration platform (such as Net Meeting, various conference bridges, directory services and concierge services), separate island services (such as Pulver Media/Free World Dial-up), gaming and appliance services (X-Box, PlayStation, Wii, et cetera) and pre-paid application services to all of the above?

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II. FeatureGroup IP is not a VoIP Provider or an IXC; FeatureGroup IP Acts Exclusively as a LEC

FeatureGroup IP must first set the record straight about what it is and what it provides. “FeatureGroup IP” is the trade name for each of a set of affiliated companies individually known as FeatureGroup IP North LLC, FeatureGroup IP Southeast LLC, FeatureGroup IP Southwest LLC, FeatureGroup IP West LLC and UTEX Communications Corp. d/b/a FeatureGroup IP. The FeatureGroup IP companies are all Competitive Local Exchange Carriers, or CLECs. Each provides (or will provide when

operational) only “telephone exchange service”¹² (or, in the alternative, exchange access service¹³) to new-technology users and non-carrier enhanced/information service providers in the form of intermediation between these users and the legacy PSTN. All of FeatureGroup IP’s services are or will be provided under FeatureGroup IP’s FCC Tariff No. 1 “Regulations and Schedule of Charges for Exchange and Information Access Service & Internet Gateway Intermediation Point of Presence Services.”¹⁴ This is NOT an “interexchange service” tariff. It covers “Exchange” and “Information Access” services. The tariff was submitted to and accepted by the Commission, and is in effect.¹⁵

¹² “[Section 153](47) TELEPHONE EXCHANGE SERVICE.--The term “telephone exchange service” means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.”

¹³ “[Section 153](16) EXCHANGE ACCESS.--The term “exchange access” means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.” FeatureGroup IP believes that the services in issue are not “exchange access service.” FeatureGroup IP has an “exchange access service” tariff but has never issued a single switched access bill. But if FeatureGroup IP is incorrect in its position that its service to non-carriers is not telephone exchange service then the only alternative is exchange access. The significance of this result is addressed below.

¹⁴ NECA is simply incorrect when it asserts on page 6 that FeatureGroup IP’s petition does not address a FeatureGroup IP tariffed product. The petition had a copy of FeatureGroup IP’s tariff as an exhibit.

¹⁵ Sections 1.0, 1.1 and 1.2 of the tariff explain the purpose and scope of the offerings:

1.0 APPLICATION OF TARIFF.

1.1 This Tariff contains regulations, rates and charges applicable to the provision of Carrier Common Line, Customer Access Line, Presubscribed Interexchange Carrier, Switched Access and Internet Gateway Intermediation – Point of Presence (“IGI-POP”) Services, and other miscellaneous services, hereinafter referred to collectively as Service(s), as defined herein, for connection to interstate communications facilities for customers within the operating areas of UTEX Communications Corporation d/b/a FeatureGroup IP (hereinafter collectively “The Company”).

Let us be crystal clear:

- * No FeatureGroup IP entity provides “Interconnected” any other kind of “VoIP” service.¹⁶ FeatureGroup IP is not an ESP and does not claim ESP status. FeatureGroup IP’s customers are ESPs.
- * No FeatureGroup IP entity does or will provide “telephone toll service”¹⁷ and – contrary to the contentions of some of the commentators – FeatureGroup IP is not an IXC as that term is used in 47 C.F.R. § 69.5(b).

When FeatureGroup IP participates in the origination or termination of a call session, it is acting in the capacity of a LEC and is therefore a co-carrier with any other LECs collaborating in the call. FeatureGroup IP is not the “customer” of the other LEC in any respect.

Carrier Common Line, Customer Access Line, Presubscribed Interexchange Carrier and Switched Access are Exchange Access services designed to support intraLATA toll and Interexchange Telephone Toll services provided by Local Exchange Carriers, IXCs and CMRS carriers. For ease of reference, these are denominated as “Access” Service.

IGI-POP is an information access service, designed to support the provision of Enhanced and/or Information services. For purposes of this Tariff, IGI-POP is not an “Access” Service.

1.2 Access Services constitute a separate offering from IGI-POP Service, with potentially different features, functions, prices, interfaces and applications. Carriers will subscribe to Access Services, while enhanced and or information service providers may subscribe to IGI-POP Service, or if they prefer, Access service. Unless the Customer expressly indicates a desire to subscribe to IGI-POP Service, Company will assume that any non-carrier Customer has ordered IGI-POP.

¹⁶ Some FeatureGroup IP customers (or their patrons, or the users of their patrons) do provide “interconnected VoIP service” as defined in 47 C.F.R. § 9.3. But a large and growing percentage of the traffic that FeatureGroup IP intermediates is not interconnected VoIP service because it does not meet all or sometimes even any of the conjunctive criteria in the definition.

¹⁷ “[Section 153](48) TELEPHONE TOLL SERVICE.--The term “telephone toll service” means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.” There are two kinds of “telephone toll service.” “InterLATA service” as defined in §153(21) is one kind and the other kind is “intraLATA” “telephone toll service.” FeatureGroup IP does not provide any “telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.” All of FeatureGroup IP’s revenues are related to its “exchange service.”

As between FeatureGroup IP and the other LEC, therefore – and as a matter of law – there are only three possible results:

1. The call session is the kind of “telecommunications” covered by § 251(b)(5) and therefore subject to the “additional cost” standard in § 252(d)(2); or
2. The call session is the kind of traffic that is – for now – subject to the rules adopted in the *ISP Remand*, which would mean that FeatureGroup IP would owe the \$0.0007 rate to the ILEC for call sessions terminated to the ILEC’s end users and the ILEC would owe FeatureGroup IP the \$0.0007 rate for call sessions originated by the ILEC’s end users and addressed to FeatureGroup IP’s customers; or
3. The call session is “jointly provided access” in which case there is a third party “access customer” that is responsible for any applicable access charges.

There is no other possible result. None of these three possible results can in any way result in an access charge obligation by FeatureGroup IP to the ILEC. FeatureGroup IP cannot be held liable for any access charges that are due for the voice-embedded Internet-based traffic in issue, even if this traffic is somehow deemed to be “telephone toll” or, in some other unknown fashion deemed to be subject to ILEC switched access tariffs. The commentators that assert otherwise are misconstruing the facts and the law.

To reiterate: FeatureGroup IP exclusively provides telecommunications services. All of those services are “LEC” services and are not “IXC” “telephone toll” services. The commentators who claim that FeatureGroup IP lacks standing to seek forbearance because it is an “LEC

access customer” or an “IXC” or an ESP or a VoIP provider¹⁸ are therefore completely wrong.

III. There is a Definite and Urgent Need for Relief

The reason that FeatureGroup IP sought forbearance was because – despite the foregoing – several ILECs are sending switched access bills to FeatureGroup IP for traffic the ILECs transport and terminate after it is directly or indirectly routed to them from FeatureGroup IP’s network. The ILECs uniformly refuse to route their *originating* traffic to FeatureGroup IP unless *FeatureGroup IP* pays them access.

FeatureGroup IP’s Texas affiliate has been trying for more than five years to obtain a replacement interconnection agreement and the major open issue was and is the intercarrier compensation that applies when a CLEC (here FeatureGroup IP) receives traffic in a LATA from one of its non-carrier ESP customers and routes it to an ILEC for transport and termination to the called party in the same LATA. The Texas PUC abated the arbitration in which this is an open issue over FeatureGroup IP’s objection. The stated reason was that it is “not appropriate to consider the issue of the regulatory

¹⁸ Embarq Comments at 3, 8, 12, 14, 21, 22; USTelecom Comments at 6; Windstream Comments at 4-5; CenturyTel Comments at 2-3; Time Warner, et. al. Comments at 3, 7-8; at&t Comments at 10.

classification of Voice over Internet Protocol (VoIP) ... a matter that has industry-wide implications in the context of this arbitration.”¹⁹

The FeatureGroup IP Texas affiliate is also embroiled in a pending dispute over the current interconnection agreement because AT&T Texas insists that it is entitled to recover access charges from *FeatureGroup IP*—despite an express provision in the current agreement that “[n]o compensation is due or payable to either Party for traffic that is *destined for or received from an Enhanced Service Provider*.”

FeatureGroup IP has also received switched access bills from Windstream and Consolidated, two other Texas ILECs. The ILECs are sending access bills to FeatureGroup IP for traffic that is more than double the amount FeatureGroup IP receives in revenue for the same traffic. Clearly, if we have to pay \$300,000 a month to our competitors to generate \$150,000 a month in revenue, we will not be able to compete.

IV. FeatureGroup IP is Seeking Forbearance from a Statutory Provision and a Commission Rule that Is Being Applied Against FeatureGroup IP in its Capacity as an LEC.

Some commentators claim that FeatureGroup IP is not seeking forbearance from a statutory provision²⁰ or Commission rule²¹ that applies to

¹⁹ Texas PUC Docket 26381, Order Abating Proceeding (June 22, 2006).

²⁰ Embarq (at 21) and USTelecom (at 7-8) each claim that FeatureGroup IP is not subject to § 251(g).

FeatureGroup IP. They claim that FeatureGroup IP is seeking relief from the effect of statutory provisions and rules that apply to ILECs.

Alternatively, they claim that FeatureGroup IP is actually using the forbearance process “to establish new rules.”²² They completely miss the point of the Petition and the ILECs’ own interpretation of the statute and rules that they have been attempting to unilaterally impose through the self-help mechanism of sending access bills *to FeatureGroup IP*.

The ILECs assert that they are entitled to recover access charges for the traffic in issue and they assert they may recover their access entitlement *from FeatureGroup IP*. The ILECs do not contest that the traffic that FeatureGroup IP handles is “telecommunications” for purposes of § 251(b)(5). As far as FeatureGroup IP can determine, therefore, the only legal rationale for excluding this LEC-LEC²³ traffic from § 251(b)(5) is a perceived “carve out” via § 251(g) using some rationale similar to that adopted by the Commission in the *ISP Remand*. FeatureGroup IP completely disagrees that this LEC-LEC traffic is or can be in any way “carved out” by § 251(g). But if

²¹ In contrast to their arguments regarding § 251(g), the ILECs do not directly assert that FeatureGroup IP is not subject to 47 C.F.R. § 69.5. AT&T, in fact, asserts that it does apply. AT&T p. 10. They nonetheless claim that FeatureGroup IP does not have standing to contest their interpretation of the application of that rule, which they say allows them to impose access charges on FeatureGroup IP. If they are correct that § 69.5 does allow them to impose exchange access charges on FeatureGroup IP when FeatureGroup IP interconnects with them so as to provide FeatureGroup IP’s telephone exchange and/or exchange access services then clearly the rule is being applied to FeatureGroup IP. The ILECs’ contention that FeatureGroup IP is subject to the rule in its capacity of a “customer” rather than a “carrier” is ludicrous, because it is FeatureGroup IP’s telecommunications services – which can only be provided while one is acting as a carrier – that are being subjected to ILECs’ access bills.

²² Verizon Comments at 5-7; USTelecom Comments at 3; NECA Comments at 6-7.

²³ As noted above, FeatureGroup IP is neither an IXC nor an ESP. It acts purely and only as an LEC and provides only LEC functions.

we are wrong then there can be no doubt that this subsection is being applied to FeatureGroup IP when it is acting in its carrier capacity and FeatureGroup IP has the right to seek forbearance under § 160(c).

The ILECs are also necessarily arguing that the traffic in issue is not “telecommunications traffic” as defined in 47 C.F.R. §51.701(b)(1). Since they deny that the ESP Exemption applies they must be arguing that the “information access” exclusion is not the basis. Therefore the only possible basis for exclusion from § 51.701(b)(1) is that the traffic in issue is “intrastate or interstate exchange access.” And, since (again) they insist that they are entitled to recover switched access charges they cannot be asserting that 47 C.F.R. § 69.5(a) applies. The only alternative is § 69.5(b). Given that the ILECs claim they may recover this asserted access entitlement from *FeatureGroup IP* (notwithstanding that FeatureGroup IP is not an IXC or even the ESP), then these ILECs are necessarily asserting that the rule somehow applies to FeatureGroup IP. FeatureGroup IP is asking the Commission to forbear from enforcing a specific statutory provision and a specific Commission rule the ILECs assert somehow apply to FeatureGroup IP in ways that result in an access obligation payable to the ILEC *by FeatureGroup IP*.

The ILECs desperately attempt to confuse the specific relief that was sought in the Petition. While FeatureGroup IP believes that ESPs who provide voice-enabled Internet-based services are not presently subject to

access charge obligations and should not be subjected to access charges in the future when ILEC local exchange facilities are used to support a call session, the Petition does *not* seek a broad exemption if we are incorrect in that belief. The Petition seeks – to the extent necessary – forbearance from any applicable statutory provisions and rules that may somehow operate to allow ILECs to impose access charges against *FeatureGroup IP* when it provides PSTN connectivity to its ESP customers. The petition is precisely scoped to obtain a result where the intercarrier compensation arrangement *as between FeatureGroup IP and any interconnecting LECs* is that governed by § 251(b)(5) and § 251(d)(2).²⁴

V. FeatureGroup IP Clearly Enunciated the Traffic Covered by the Petition; the Opponents Cannot Be Allowed to Confuse the Issue.

Those opposing the FeatureGroup IP Petition either intentionally or mistakenly confuse the traffic that is covered by the request. Again, let us be clear. First, the Petition covers far more than “interconnected VoIP service”²⁵

²⁴ This is evident from the discussion on pages 11, 16, 24-25, 31, 45, 50 and 57 of the petition. FeatureGroup IP most certainly would not oppose broader results that would apply to other similarly situated LECs that have a tariffed offering similar to FeatureGroup IP’s “IGI-POP” service. Nor would FeatureGroup IP be unhappy at all if the Commission simply ruled that the ESP Exemption applies and ESPs that provide or support voice embedded IP-based services and applications have no access obligation at all under Rule 69.5(b). But that is not what the petition requests to the extent FeatureGroup IP is presently subject to some access charge obligation to other LECs because of the traffic it handles as an LEC.

²⁵ Interconnected VoIP service is an enhanced and/or information service as well. The ILECs that argue to the contrary have never explained, for example, just how it can be that a telecommunications service can somehow exist “on top” of broadband Internet access, which the Commission has ruled is an information service. Information services are provided “via telecommunications.” There is just no way the statute can be parsed so as to reach the conclusion that a telecommunications service can be provided “via” an information service or

as defined in 47 C.F.R. § 9.3. It covers “voice-embedded IP-based service” which FeatureGroup IP defined on pages 10-11 of the Petition:

Voice Embedded IP-based communications, services and applications that involve or are part of (i) a net change in form; (ii) a change in content; and/or (iii) an offer of non-adjunct to basic enhanced functionality when there is an end-point on the Public Switched Telephone Network (“PSTN”). Specifically, FeatureGroup IP seeks forbearance for Voice Embedded IP-based communications, services and applications related traffic that (1) originates in IP format and terminates to the legacy “Time Division Multiplexed” (“TDM”) circuit-switched telephone network; (2) originates on the legacy TDM circuit-switched telephone network and is addressed to an IP-based end point; or (3) originates on the legacy TDM circuit-switched network and terminates on the legacy TDM circuit-switched network but (a) is connected to an IP-based platform during the call session and (b) as a result to use of the IP-based platform, there is a change in content or non adjunct-to-basic enhanced functionalities are offered to the user. Communications between an IP-based end point and a legacy TDM circuit-switched end point – regardless of which end-point initiated the session – will hereinafter be referred to as “IP-PSTN traffic.” “Incidental” traffic occurs where all of the relevant end-points are on the legacy TDM circuit-switched network but an IP-based platform is involved and there is a change in content and/or non adjunct-to-basic enhanced functionalities are offered.

This is clearly not a description of any “telecommunications service” and on its face excludes the kind of traffic addressed in the *AT&T*

Declaratory Ruling.²⁶ The FeatureGroup IP Petition was purposely drafted to expressly apply only to traffic coming from or going to FeatureGroup IP’s

“over ESP (rather than common carrier) facilities.” Use of the underlying enhanced/information service (broadband Internet access) completely removes any possible legal construction that would lead to the conclusion that a service or application that rides on top of the Internet access service and facility is or can be a “telecommunications service.”

²⁶ Qwest’s assertion to the contrary on page 14 is incorrect. The petition limited “incidental” PSTN-PSTN traffic to only that which does involve a change in content and/or an offer of non adjunct-to-basic functions. That very clearly eliminates the traffic addressed in the *AT&T Declaratory Ruling*. For this reason, AT&T’s similar argument on page 25 and note 72 is also incorrect.

customers²⁷ and when the FeatureGroup IP customer's traffic involves (1) a change in form and/or (2) a change in content and/or (3) an offer of non adjunct to basic enhanced functions. By definition, therefore, the ESP's service is not part of a "telecommunications service" and is absolutely part of an enhanced and/or information service. The ILECs cannot be allowed to confuse the issues, the traffic covered by the petition, the reason it is necessary or the relief that is sought.

VI. The ESP Exemption Is Relevant and It Applies to this Traffic.

The ILECs try very hard to reinvent the history and scope of the so-called "ESP Exemption." They argue that even though the Act clearly applies "exchange access" charges only to "telephone toll" (a telecommunications service) and even though § 69.5(b) applies only to "interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services" the ESP Exemption that is codified in both the Act and the rule somehow do not apply to all or some of the traffic in

²⁷ Once again, just so there is no confusion, FeatureGroup IP is not the provider of the voice embedded IP-based communications application or service. FeatureGroup IP provides the means by which the ESP obtains PSTN connectivity. The Petition seeks to have the Commission rule that forbearance is not necessary because access does not apply to FeatureGroup IP when it provides this connectivity as part of its LEC functions. In other words, when an ILEC must collaborate with FeatureGroup IP to facilitate termination to a PSTN end-point or to facilitate call origination from a PSTN end-point to FeatureGroup IP's network for delivery to the ESP's facilities then the ILEC cannot assess charges on FeatureGroup IP. If, contrary to FeatureGroup IP's contentions, FeatureGroup IP is somehow responsible to the ILEC for any access obligation then FeatureGroup IP seeks forbearance from the statutory provision and/or rule that operates to allow ILECs to demand and recover access charges from FeatureGroup IP.

issue. They do so by asserting that the “Exemption” is “limited” and applies only when end users initiate a call from an ESP’s customer to the serving ESP and even then only when the ESP is in the same local calling area.²⁸ They cannot succeed in their quest to change the scope of the ESP Exemption in the guise of interpretation by engaging in creative citation to cases or selective passages in Commission briefs. It is clear that the Exemption was never limited to only calls to an ESP by that ESP’s customer and only when the ESP was physically located in the same local calling area as the calling end user.

The ESP exemption was created to explicitly promote innovation and competition by allowing non-carriers to innovate at the edge. Compare the intent of the ESP Exemption to the new call signaling rules proposed by the same incumbents who now oppose FeatureGroup IP, and it quickly becomes apparent that the ILECs are in fact requesting establishment of an anti-innovation policy. They functionally request that the FCC limit user choice and control and regulate at the edge. They also want to be able to claim that calls without traditional numbers are “illegal” and “fraudulent” and therefore can be assessed at the highest possible rate – intrastate access charges.²⁹

²⁸ Qwest Comments at 9-11; USTelecom Comments at 5; TSTCI Comments at 2; CenturyTel Comments at 11; NECA Comments at 12-13; at&t Comments at 9-13.

²⁹ As a practical matter, if the call signaling rules proposed by the ILECs are adopted, the IILEC will have a right to “deem” a call as “fraudulent” and process a charge against the interconnecting CLEC.

The Commission has never held that the Exemption only applies to calls to ESPs and it has certainly never held that the ESP must be “physically located”³⁰ in the same local calling area. Second, the Commission has never limited to ESP Exemption to calls between an ESP and the ESP’s customers. The Exemption is identity based.³¹ If an entity is an ESP then no access can apply to traffic to or from the ESP’s facilities. The ESP does not pay access for the ability to receive traffic regardless of who it is from or where it is from. The ESP does not pay access for calls it originates, regardless of whom it is to or where it goes.³²

This is evident from the source of the term “information access” as it is used in § 251(g). That phrase came from the Modification of Final Judgment.³³ The MFJ had this definition in Section IV.I of the decree:

“Information access” means the provision of specialized exchange telecommunications services by a BOC in an exchange area in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of a provider of information services. Such specialized exchange telecommunications services include, where necessary, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes,

³⁰ FeatureGroup IP will not even try to address how an ESP’s “physical location” might be fixed under any such limitation. The ILECs have never articulated any consistent or workable test to “geolocate” the ISP for purposes of deciding where the ESP’s “end-point” is. Qwest at one point, did at least try, with its proposal to look to the ESP’s declared “point of presence” in a LATA. Qwest, at 11. But they no longer support that analysis.

³¹ The Commission made exactly this point in ¶ 30 of the *ISP Remand Order* when it said that “[t]he exemption focuses not only on the nature of the service, but on to whom the service is provided.”

³² The ESP can, of course subscribe to telephone toll service as necessary to make telephone toll calls or to arrange for an 8YY toll-free inbound service. But the ESP is still acting as an end user, not an IXC.

³³ See *ISP Remand Order* ¶¶ 39, 42-43.

testing and maintenance of facilities, and the provision of information necessary to bill customers.³⁴

This definition clearly shows that “information access” supported calls “to or from the **facilities** of a provider of information services.” There was no limitation to calls only “to or from” the ESP’s customers. While the decree speaks to services “in an exchange” it must be remembered that for purposes of the decree an “exchange” is not just a local calling area but is instead an entire “LATA”³⁵ And the only reason it was limited to calls within LATA was because the **RBOCs** could not provide interLATA services.³⁶

The ESP Exemption is not and never was “a narrow exception to the access rule”; to the contrary it is broad and applies to everything that is not both (1) telephone toll and (2) offered by a telecommunications carrier.

Everything that is not “telecommunications service” is enhanced/information

³⁴ *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982).

³⁵ The decree had this definition:

[IV]G. “Exchange area,” or “exchange” means a geographic area established by a BOC in accordance with the following criteria:

1. any such area shall encompass one or more contiguous local exchange areas serving common social, economic, and other purposes, even where such configuration transcends municipal or other local governmental boundaries;
2. every point served by a BOC within a State shall be included within an exchange area;
3. no such area which includes part or all of one standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States) shall include a substantial part of any other standard metropolitan statistical area (or a consolidated statistical area, in the case of densely populated States), unless the Court shall otherwise allow; and
4. except with approval of the Court, no exchange area located in one State shall include any point located within another State.

United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 229 (D.D.C. 1982).

³⁶ The Commission obviously agrees that ESP traffic need not be “local” to qualify for the Exemption. *See ISP Remand Order* ¶ 44 and n. 82 and ¶ 45.

service and exempt from access charges. The revisionist and selective history and analysis of enhanced/information services and the ESP Exemption the ILECs recite do not withstand any reasonable scrutiny.

Enhanced services were defined long before there was a public Internet. ESPs do far more than just hook up “modems” and receive calls. They provide a wide set of services and many of them involve calls to the PSTN.³⁷ The FCC observed in the first decision that created what is now known as the “ESP Exemption” that ESP use of the PSTN resembles that of the “leaky PBXs” that existed then and continue to exist today, albeit using much different technology. Leaky PBXs originate calls that terminate on the PSTN.³⁸ The FCC expressly recognized the bidirectional nature of ESP traffic, when it observed that ESPs “may use incumbent LEC facilities to originate and terminate interstate calls.”

The following passage from one of the *Access Charge Reform* orders completely belies the attempt to limit the ESP Exemption:

³⁷See, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket Nos. 96-262, 96-263, 94-1, 91-213, FCC 96-488, 11 FCC Rcd 21354, 21478, ¶ 284, n. 378 (rel. Dec. 24, 1996); Order, *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, FCC 88-151, 3 FCC Rcd 2631, 2632-2633, ¶13 (rel. April 27 1988); Memorandum Opinion and Order, *MTS and WATS Market Structure*, Docket No. 78-72, FCC 83-356, ¶¶ 78, 83, 97 FCC 2d 682, 711-22 (rel. Aug. 22, 1983).

³⁸ See, Memorandum Opinion and Order, *MTS and WATS Market Structure*, Docket No. 78-72, FCC 83-356, ¶¶ 78, 83, 97 FCC 2d 682, 711-22 (rel. Aug. 22, 1983) [discussing “leaky PBX and ESP resemblance”]; Second Supplemental NOI and PRM, *In the Matter of MTS and WATS Market Structure*, FCC 80-198, CC Docket No. 78-72, ¶ 63, 77 F.C.C.2d 224; 1980 FCC LEXIS 181 (rel. Apr. 1980) (discussing “leaky PBX”).

341. In the 1983 *Access Charge Reconsideration Order*, the Commission decided that, although information service providersⁿ⁴⁹⁸ *(ISPs) may use incumbent LEC facilities to originate and terminate interstate calls*, ISPs should not be required to pay interstate access charges.ⁿ⁴⁹⁹ In recent years, usage of interstate information services, and in particular the Internet and other interactive computer networks, has increased significantly. ...

n498 The term “enhanced services,” which includes access to the Internet and other interactive computer networks, as well as telemessaging, alarm monitoring, and other services, appears to be quite similar to the term “information services” in the 1996 Act.... For purposes of this order, providers of enhanced services and providers of information services are referred to as ISPs.

n499 *MTS and WATS Market Structure*, Memorandum Opinion and Order, Docket No. 78-72, 97 FCC 2d 682, 711-22 (Access Charge Reconsideration Order). See also *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Order, 3 FCC Rcd 2631 (1988) (ESP Exemption Order).³⁹

The notion that the ESP Exemption was only for “connections between ESPs and their subscribers” is pure mythology. The various ILECs now owned by AT&T – none of whom have ever been strident advocates for a broad interpretation and application of the ESP Exemption – have had various CEI plans for several services that involved calls going out of the affiliated ESP’s platform and to PSTN customers that are not the “ESP’s subscribers” but were instead persons the ESP subscriber wanted to communicate with. Similarly, these plans contemplate calls coming in to the platform from nonsubscribers for delivery to subscribers.

³⁹ First Report and Order, *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, CC Docket No. 96-262; CC Docket No. 94-1; CC Docket No. 91-213; CC Docket No. 95-72, FCC 97-158, ¶ 341 and notes 498 and 499, 12 FCC Rcd 15982 (rel. May 1997) (emphasis added).

The best and most analogous example is found in the CEI plans for “Facsimile Store and Forward Service” that AT&T-affiliated ILECs have had in place since at least 1995.⁴⁰ Those plans involved calls from nonsubscribers wanting to reach subscribers and calls from subscribers wanting to reach nonsubscribers. Each was treated as an enhanced service, and each was treated as fully eligible for the ESP Exemption. ESPs have always both originated and terminated traffic, and their services have always involved calls both to and from nonsubscribers, because they handled traffic between their subscribers and those who wished to communicate with them. The Commission expressly recognized as much when it observed that under the current rules “long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption.”⁴¹

The opponents uniformly assert that voice embedded IP-based services do not “use” local exchange facilities like other ESPs but instead make the

⁴⁰ One by “Ameritech” that was filed in 1995 is available at <http://www.att.com/PublicAffairs/PublicPolicy/CEIplans/81849.pdf>. That CEI plan was amended in 1999 to provide more functionality, and likely expanded the number of calls to the platform by “nonsubscribers” and from the platform to “nonsubscribers.” <http://www.att.com/gen/public-affairs?pid=2987>. Southwestern Bell Telephone’s similar plan from 1995 can be viewed at <http://www.att.com/PublicAffairs/PublicPolicy/CEIplans/82007.pdf>.

⁴¹ Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 01-132 ¶¶ 5-7, 16 FCC Rcd 9610, 9613-1614 (rel. Apr. 2001). The ILECs (Embarq p. 7; TDS Telecom p. 3; NECA Embarq comments p. 8; AT&T p. 40) very much like the policy goal expressed in the NPRM – that all uses of the PSTN should pay the same charge – but they forget that was the goal for contemplated new rules rather than a statement of the current rules. The statement of the current rules, including the finding that “IP telephony” is exempt from access, appears in ¶¶ 5-7.

same use as do IXC's.⁴² They are incorrect. The "use" is precisely the same as all other ESP traffic that has existed ever since enhanced service providers were recognized as such in the *Computer Inquiry* and when the "ESP Exemption" was recognized in the *MTS/WATS* case. The ESP is "using" local exchange facilities in order to offer and provide an enhanced/information service to its customer so the customer can interact with the ESP's platform or communicate with other users on the Internet or the PSTN. While it is correct that – when observed on an "end to end" basis – the communications are largely interstate and often "interexchange" this has always been so for all ESP services. Voice enabled IP-based services and applications involve a change in content and/or an offer of non adjunct-to-basic enhanced features, just like all other ESP services. There is often a "change in form" as well, just like with other ESP services. The ESP's service is therefore not a telecommunications service and is not "telephone toll" or even like telephone toll even though there is of course some substitutability or even "interchangeability" as is the case with "interconnected VoIP service." Nonetheless, it is an enhanced/information service. There is a distinct difference of both kind and degree in comparison to traditional telephone toll service.

There is nothing in the law or the history of the ESP Exemption that allows or justifies different intercarrier compensation based on the "type" of

⁴² at&t Comments at 24; Verizon Comments at. 7; Embarq Comments at 19-20, 33; USTelecom Comments at 6; CenturyTel Comments at 5; TDS Telecom Comments at 3; NECA Embarq comments at 5-6.

enhanced service that is being provided. The ESP Exemption applies if the LEC's customer is an ESP. Now that there is competition in the telephone exchange and exchange access services markets, all co-carriers must honor the Exemption or else there is no exemption and there can be no competition between incumbents and CLECs for the provision of PSTN connectivity to ESPs.

VII. FeatureGroup IP's Petition Does Not Fail Under *Core*.

Several opponents⁴³ incorrectly assert that FeatureGroup IP's petition is fatal for the same reasons as the one denied in *Core*.⁴⁴ *Core* involved a request that the "Commission forbear from: (1) section 251(g) and its implementing rules to the extent they apply to or regulate the rate for compensation for switched exchange access, information access, and exchange services for such access to interexchange carriers and information service providers' pursuant to state and federal access charge rules; and (ii) any limitation, by [Commission] rule or otherwise, on the scope of section 251(b)(5) that is implied from section 251(g) preserving receipt of switched access charges." *Core* further requested "that the Commission apply the forbearance requested in its petition to all telecommunications carriers, such

⁴³ NECA Comments at 8; TDS Telecom Comments at 2; CenturyTel Comments at 4-5; Time Warner Telecom, *et. al.*, Comments at 4-5; at&t Comments at 17-18.

⁴⁴ Memorandum Opinion and Order, *In the Matter of Petition of Core Communications, Inc. for, Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, WC Docket No. 06-100, FCC 07-129, 22 FCC Rcd 14118 (rel. Jul. 2007).

that grant of its petition would subject these carriers to section 251(b)(5) of the Act for rate setting purposes.”⁴⁵ Core wanted the Commission to essentially forbear from applying § 251(g) in its entirety. Core’s self-described intended result was that all traffic of all kinds regardless of “jurisdiction,” “type,” “customer” or “provider” would then be subject to § 251(b)(5) and the additional cost criterion in § 252(d)(2) by default. This is evident from Core’s petition on page 17:

If all carriers receive the same rate for terminating traffic, it simply won’t matter whether that traffic is categorized as “interstate,” “intrastate,” “ISP,” “local,” “long distance,” “toll,” “interLATA,” “intraLATA,” “CMRS,” “interMTA,” “intraMTA,” “FX,” “V-FX,” “VNXX,” or something else. Regardless of how traffic is classified today, the terminating carrier is providing the same functionality and should be compensated accordingly.

Core’s theory was that but for § 251(g) all telecommunications traffic handled by any and all carriers would be completely covered by § 251(b)(5) and therefore forbearance from enforcement of the “rate regulation” in § 251(g) would put all telecommunications traffic of all types “back” into § 251(b)(5). The Commission disagreed by observing that forbearance from § 251(g) would not automatically default all traffic back into § 251(b)(5). Forbearance would therefore lead to an “absence of regulations” for any traffic that did not default back.⁴⁶

The Commission was most certainly correct in this regard – at least as it pertains to traditional “telephone toll” service provided by IXCs. Section

⁴⁵ *Core*, supra ¶ 6.

⁴⁶ *Core*, supra ¶ 14 and n. 54.

251(b)(5) does not automatically govern the rate an IXC must pay (or, as stated in § 251(g) terms “the receipt of compensation” by an ILEC) to an LEC when local exchange facilities are used to originate or terminate a telephone toll call. Nor does it automatically govern the rate an IXC pays when two LECs collaborate to provide exchange access. The Commission would have to amend its rules to subject telephone toll service to the § 251(b)(5) and § 252(d)(2) regime rather than the exchange access regime.

But the situation now before the Commission is different. The matter here relates to the relationship between two LECs that collaborate to handle a call session, where neither one is the “provider” of the service (*e.g.*, neither FeatureGroup IP nor the ILEC is the IXC or the voice embedded IP-based service provider) and both LECs are merely providing either telephone exchange or exchange access service to their respective customers. Neither LEC is the “customer” of the other. The Commission clearly understands the distinction, and discussed it in ¶ 38 in the *ISP Remand Order* and in ¶ 66 and subsequent paragraphs. The *ISP Remand Order* regime applied to the compensation between two LECs that collaborate to complete a call between a basic service customer and an ESP’s facilities. The Commission did not treat ESP traffic like jointly-provided access by allowing each LEC to assess the ESP for the portion of the service it provided. Although the Commission again refused to determine whether the LECs were providing “telephone exchange service” or “exchange access service” when they jointly collaborated

to handle ESP traffic, it is clear that those are the only possible choices. The FCC has never considered the LEC serving the basic customer or the LEC serving the ESP to be an “access customer” of the other LEC.

FeatureGroup IP’s petition therefore does not present the problem identified in *Core*. The question before the Commission is what intercarrier compensation regime applies between two LECs that collaborate to handle traffic between the facilities of a provider of voice embedded IP-based services and applications and a basic local telephone service customer. FeatureGroup IP, of course, asserts that under the current law § 251(b)(5) and § 251(d)(2) govern the relationship. If we are incorrect the only possible basis is that the LEC-LEC portion is somehow “carved out” by § 251(g) notwithstanding *Worldcom*. Unlike the situation in *Core*, for the traffic covered by FeatureGroup IP’s petition if the FCC does forbear from enforcement of § 251(g) then for the traffic covered by FeatureGroup IP’s petition § 251(b)(5) will “automatically, and by default, govern traffic that was previously subject to section 251(g).”⁴⁷ There will not be an absence of regulation.

VIII. Applying § 251(b)(5) and § 252(d)(2) would not result in any subsidy.

Several of the ILECs assert that granting FeatureGroup IP’s petition will result in a “subsidy” to either FeatureGroup IP or its ESP customers.⁴⁸

⁴⁷ See *Core* ¶ 14.

⁴⁸ Embarq Comments at 25; Windstream Comments at 6, 8; CenturyTel Comments at 4, 7-9; at&t Comments at 2, 22, 25.

They essentially imply that they will not be compensated for the “use” of their network. This is flatly wrong. If the Commission grants the petition then the intercarrier compensation will be governed by the “additional cost” standard in § 252(d)(2), unless the ILECs and FeatureGroup IP enter into a § 252(d)(2)(B)(i) voluntary arrangement “that afford(s) the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements).” Pursuant to § 252(d)(2)(A) the ILEC will receive compensation based on a “reasonable approximation of the additional costs of terminating such calls” and this will include a reasonable profit. This statutory standard is compensatory and just and reasonable. The Commission prescribed use of TELRIC to measure the additional cost, and the U.S. Supreme Court has affirmed that method. Since the ILECs will be paid their costs, there is absolutely no subsidy from application of the statutory standard. The ILECs’ real problem is not that there will be a subsidy “to” FeatureGroup IP or its customers. Their problem is that there will be no subsidy flowing from FeatureGroup IP or its customers. Their attempt to convert a failure to be subsidized into payment by them or others of a subsidy to voice embedded IP-enable services is completely incoherent from an economic and legal perspective.

Congress intended that all implicit subsidies buried into user rates and intercarrier compensation be eliminated when it passed the 1996 amendments. While it is true that the Commission was given a reasonable

period to accomplish this task, 12 years is far outside the bounds of reasonableness. But FeatureGroup IP submits that Congress clearly did not intend for enhanced/information service traffic to be added to the list of services or users that were to pay implicit subsidies during the transitional period. Any decision to newly subject ESP traffic to switched access – or to now require one LEC to pay switched access to another LEC when the two LECs collaborate to handle traffic between an ESP’s facilities and a basic local service user when that has never been the rule – would flatly violate the letter and spirit of the Act. If this has somehow been the *sub silentio* rule all along, it should be ended now because otherwise CLECs will not be able to compete at all with ILECs when it comes to providing PSTN connectivity to ESPs. Forbearance is wholly appropriate under § 160(a) because that is the only remaining means to facilitate competition between ILECs and CLECs for intermediation between the Internet and the PSTN.

IX. FeatureGroup IP Is Not “Laundering Traffic”

CenturyTel, NECA and Embarq claim that “AT&T has introduced evidence ... showing that UTEX Communications [the Texas FeatureGroup IP affiliate] is laundering traffic, routing nonlocal traffic over local trunks for termination on the PSTN to evade its tariffed access charges.⁴⁹ Their description of the evidence in the ongoing post-interconnection dispute in

⁴⁹ CenturyTel Comments at 23, note 49; NECA Comments at 11; Embarq Comments at 23, note 49.

Texas is a complete misrepresentation. Even AT&T did not come close to making that charge in its comments even though AT&T initially alleged there was call-laundering in its initial pleadings in the Texas case. AT&T was at least prudent enough to finally admit that it was flatly wrong and that there was and is in fact no evidence to support its initial claims.

FeatureGroup IP rigidly adheres to a principle of fidelity with regard to signaling information; it does not change any SS7-based information that it receives from its customers or interconnecting carriers.⁵⁰ Once the evidence was heard in the Texas case it became clear that the problem was not that the Texas FeatureGroup IP affiliate was changing the signaling information, but that it was not: when the Texas FeatureGroup IP affiliate received traffic from platforms, customers or users that employed devices, services, applications or technologies which had no traditional number it passed on the signaling information “without alteration.” AT&T asserted that the “unaltered” CPN information it received from the Texas FeatureGroup IP affiliate was “invalid” and the Texas FeatureGroup IP affiliate must therefore be supporting “traffic washing” and “misrouting” of long distance service. By the end of the case it was relatively clear that the traffic was not regular telephone toll that had originated on the PSTN, and AT&T ultimately admitted under oath that there was absolutely no evidence that the Texas

⁵⁰ It is difficult to confront accusers such as CenturyTel that hide behind lawyers that know little of what they speak and simply repeat old and now-disproved rumors. AT&T’s similar counter-factual and technology-ignorant premises were destroyed once they were required to provide sworn testimony concerning and be subject to cross-examination regarding their scurrilous allegations.

FeatureGroup IP affiliate or its direct customers were altering CPN information in any way.

The problem in the Texas case is the very one that the ILECs assume away through hand-waving. They contend that there is not at present much traffic associated with new-technology applications, services or devices that do not need or use traditional telephone numbers. But the truth likely lies elsewhere. Much (and a growing percentage) of the “phantom” traffic they claim is just traditional telephone toll with calling party information stripped or altered is not that at all. Instead, their “phantom” traffic is probably the very thing they say is *de minimis* and they therefore assume is not yet a “problem.” In the very Texas case they misuse to support their case it was 80% of “the problem.” If the voice enabled IP-based service user’s application, service or device does not have a traditional telephone number there is no traditional telephone number to send. FeatureGroup IP’s signaling practices are not part of traffic washing; indeed, this traffic is already “clean.” It is clearly, cleanly and simply traffic associated with the provision of an enhanced/information service being provided by an ESP.

FeatureGroup IP’s service that supports PSTN connectivity to ESPs is a “telecommunications service.” More specifically it is, as a matter of law, either “telephone exchange service” or “exchange access service” and is not, as a matter of law, “telephone toll service.” FeatureGroup IP, acting in its capacity as an LEC that interconnects with other LECs and collaborates with

them to support calls to or from ESP facilities, is not subject to access charge assessments from ILECs. If we are somehow wrong in this conclusion then we have sought forbearance from the application of the only statutory provision and the only Commission rules that could possibly support access charge liability by FeatureGroup IP. The forbearance criteria are met, and the requested relief should be granted.

X. Pricing for Internet Communications

It does not take a regulatory economist to recognize that there is no broad economic or social value derived from allowing the controller of the access facility to charge supra-competitive rates to Internet Application Providers and, by extension, the users of such networks and applications. If the FCC's goal is, indeed, to eliminate arbitrage opportunities⁵¹ and to

⁵¹ FeatureGroup IP cannot help but observe that the recent abhorrence expressed by the Commission concerning so-called "arbitrage" is a stark change from the policies it had in place for many years. For a very long time the Commission correctly recognized that "arbitrage" is merely normal economic activity. The FCC expressly and unabashedly used "arbitrage" as a salutary tool to combat discrimination, in order to move prices towards cost, to allow efficient competitive entry and to protect against the exercise of excessive market power. *See, e.g.*, Policy Statement, *In the Matter of Policy Statement on International Accounting Rate Reform*, FCC 96-37, ¶¶ 4, 21, 11 FCC Rcd 3146, 3149 (rel. Jan. 1996) Released; Adopted January 31, 1996; Memorandum Opinion, Order and Authorization, *In re Application of AMERICAN TELEPHONE AND TELEGRAPH COMPANY; For Authority under Section 214 of the Communications Act of 1934, as amended, to Install and Operate Packet Switches at Specified Telephone Company Locations in the United States*, File No. W-P-C-4841, FCC 83-221, ¶ 30 and note 33, 94 F.C.C.2d 48, 62-63 (rel. May 1983) ("We believe the twelve-month notice requirement would discourage resale, sharing and arbitrage. Arbitrage, in the Commission's regulatory scheme, is seen not as a means of developing vested interests, but as a way of bringing rates into line with competitive pricing patterns. Once the forces of arbitrage and/or sharing make the maintenance of monopoly-type rates infeasible, we expect that the initiator of these rates will eliminate the discrimination and the opportunity for arbitrage. ..."); Memorandum Opinion and Order, *In the Matter of*

*AMERICAN TELEPHONE AND TELEGRAPH COMPANY; Revisions to Tariff F.C.C. No. 259, Wide Area Telecommunications Service (WATS)*_CC Docket 80-765, FCC 82-179, ¶ 16 and note 16, 89 F.C.C.2d 889, 896-897 (rel. April 1982) (The notion that rate structure elements in the WATS tariff may be a means to achieve price discrimination is not a new one. Indeed, we have evidence that WATS provision in the past may have prevented economic activity, such as arbitrage, the effect of which is to reduce price discrimination between users of the like services, MTS and WATS. ..."); Memorandum Opinion and Order and FNPRM, *In the Matter of AMERICAN TELEPHONE AND TELEGRAPH COMPANY; Offer of Facilities to Other Common Carriers*, Docket No. 21499, FCC 83-39 ¶ 20, 92 F.C.C.2d 1216, 1227-1228 (rel. Feb. 1983); Memorandum Opinion and Order, *In the Matter of American Telephone and Telegraph Company, and The Associated Bell System Operating Companies*, Transmittal Nos. 13661 and 13662; Transmittal No. 632, et al., FCC 81-222, ¶ 15, 86 F.C.C.2d 689, 694-695 (rel. May 1981) ("Because of this serious regulatory dilemma, the Commission has been forced in recent years to seek more manageable means of fulfilling its statutory oversight function. The means we are now employing include structural measures such as the removal of resale restrictions which, by making it possible for customers to arbitrage on different rates, should help align these rates more closely with costs, ..."); Memorandum Opinion and Order, *In the Matter of American Telephone and Telegraph Company; Revisions to Tariff F.C.C. No. 259, Wide Area Telecommunications Service (WATS)*, Transmittal No. 13555, CC Docket No. 80-765; FCC 80-777, ¶ 33, 84 F.C.C.2d 158, 171 (rel. Dec. 1980) ("The Commission has therefore had to rely heavily upon other kinds of regulatory devices to fulfill its statutory mandate. These have included structural devices such as resale and shared use proceedings looking towards the elimination of potential barriers to arbitrage contained in tariffs, proceedings seeking to eliminate other types of tariff restrictions that may pose barriers to arbitrage or otherwise disadvantage the public without good reason, and proceedings designed to make AT&T's tariffs more readily comprehensible as well as to make any price discrimination more visible."); Report and Order, *In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, CC Docket No. 80-54; RM 3453, 80-607, ¶¶ 2, 17, 18, 83 F.C.C.2d 167, 168-169, 175-176 (rel. Dec. 1980) ("For many years, certain carriers, such as ... AT&T ... have limited resale and sharing of their services through restrictions in their tariffs on file with this Commission. In 1974, however, we began to question whether these restrictions have operated to segment markets and sustain price discriminations. In other words, we were concerned that resale and sharing restrictions prevented normal economic activities such as arbitrage, which could help insure that rates are cost-based. Our theory may be plainly stated: by purchasing discounted bulk public switched network services such as WATS, and reselling them to smaller users as substitutes for MTS, arbitrageurs would create pressure on the underlying carrier to set rates for the discounted service which fully recover the costs of providing that service. ... Indeed, AT&T itself concedes that resale and sharing of all interstate telecommunications services can have "salutary effects" ... and that resale and sharing can benefit the public by assuring through the arbitrage mechanism that the resold and shared services are offered at rates closely related to cost. ... Our decision to prescribe unlimited resale and shared use of public switched network services reflects in large part our determination to alleviate the adverse impact of price discrimination. Thus we expect resale activities to moderate certain types of discrimination in the pricing of telephone services in instances where the firm is not providing a product or service in appropriate relationship to its cost. The desired result would come about when arbitrageurs (entities purchasing a product in one market and reselling it in another market for a guaranteed profit) are free to search out and capitalize upon attempts by the telephone company to charge different prices for the same product. If the decision to use MTS is not based on those aspects of the service which appear to differentiate it from WATS (e.g., dedicated access lines, advanced billing, two termination

maximize the value and capabilities of all communications, the FCC should move to ensure that users of Internet communications can more efficiently and more cost-effectively reach users of the narrowband PSTN, and vice versa.

FeatureGroup IP believes that ultimately, all networks should recognize that bill and keep is probably the most logical and fairest solution to promote the broadest social and economic good and would serve to limit any entity from wielding excessive market power or control over other entities and consumers. The FCC should make it clear that under the current rules reciprocal compensation principles – rather than access charges – apply when two LECs collaborate to complete a call to or from an ESP’s facilities. This is the best way to ensure that no provider is allowed to game intercarrier compensation with regard to ESP traffic.

Certainly, there is no reason to allow telcos to self-determine (or to hide behind tariffs designed for the pre-Internet Age) that the appropriate rate for Internet communications without a geographically-tagged identifier should be the highest access rate (typically *intra*-state access). The telcos seem to ignore the fact that the Internet has no technical or business reason whatsoever to “geographicalize” service and that attempts to do so inhibit competition and innovation both of which benefit America and all network

requirement) then it can be expected that removal of resale and sharing restrictions will result in consumers purchasing WATS service at cheaper unit rates, using none or only a portion and selling or sharing the rest with other users at cheaper rates than MTS. If WATS prices are not cost-based, the increased demand for WATS lines will eventually force the telephone company to withdraw the offering or reprice it such that rates are based on costs.”)

consumers in different ways. We should treat all Internet traffic the same under a bill and keep regime, or at least a reciprocal compensation scheme. From the Internet perspective, bill and keep has been and will continue to be the guiding principle that maximizes communications and use of the network and the consumer experience. Frankly, it seems irreconcilable and profoundly illogical to the innovators, entrepreneurs and users of Internet-based communications that when a user of an Internet-based network needs to reach a counterpart on the narrowband PSTN, additional fees somehow apply, particularly given the fact that there is much less functionality on the narrowband PSTN. Logically, one might assume that, if any additional fees should apply, those fees should be assessed against those sending communications or other content *to* the Internet, given that it might arguably provide *more* value to allow the users of the narrowband PSTN to reach and participate in the more robust, more functional world of Internet-based communications. The telcos, however, do not seem to recognize the value that disintermediated Internet applications bring to their narrowband customers.

It is an unfortunate reality that every step of the way, in the reform of interconnection and intercarrier compensation regimes, the telcos (particularly the incumbent local exchange carriers) have managed to eliminate those areas where they were or became net payors of intercarrier compensation and perpetuated those areas where they were or became net

recipients of intercarrier compensation. For example, incumbent local exchange carriers fought against a bill and keep regime for transport and termination of telecommunications, and obtained supra-competitive compensation that was well above the switching and transmission costs. When competitive carriers recognized the arbitrage opportunity associated with terminating traffic, the incumbents then succeeded in reducing the rates of such termination by largely excluding ISP-bound communications from the standard reciprocal compensation regime. Now that the Internet is “calling” the PSTN rather than the other way around, telcos want to be paid a very high price for the Internet to reach users relegated to the narrowband PSTN. What the telcos consistently fail to acknowledge is that, regardless of whether the telco network is originating or terminating, consumers are merely using telephone exchange service; they are not making or receiving telephone toll calls. And, more important, both parties to the call session derive value – so it seems incongruous from an economic perspective to force a “calling network pays access” regime on this fundamentally different communications form.

Furthermore, the access rates that apply to the origination and termination of telephone toll traffic obviously bear no connection to the reasonable costs and competitive profit that should be associated with such traffic. It, however, has been too much of a political hot button to bring such

costs down to rates more in line with reasonable costs with profits resembling those that would likely exist in a competitive market.

How could policymakers ever expect the telcos to sit down and negotiate a fair, forward-looking interconnection and inter-provider compensation scheme if, at every step of the way, the telcos are freed from any of the most onerous payer obligations? Every time a competitive opportunity arises that would compel the telcos to adopt a uniform regime (be it bill and keep, reciprocal compensation or a legitimate cost-based inter-carrier compensation regime), the telcos have succeeded in eliminating the alleged opportunity by throwing down the epithet of “arbitrage.” Regulators should recognize these inevitable opportunities as clear evidence that the system is irreparably broken, and realize that the competitors are engaging in normal *and salutary* economic activities. The solution is to reform the system by taking prices to cost. The absolute wrong way to go is to draw Internet communications into the broken system, even for what regulators might view as a temporary period until the system is ultimately fixed.⁵² Without the pressure to participate in *bona fide* inter-carrier compensation reform, the telcos will succeed in stalling reform indefinitely, and will perhaps even extend the broken system to the Internet, to the benefit of no

⁵² As we have seen over the past dozen years since passage of the Telecom Act, what one Commission views as “temporary” tends to linger in perpetuity, especially a political third-rail issue like intercarrier compensation. The FCC, at least, has a proceeding before it with the FeatureGroup IP Forbearance Petition, that could propel the industry in the direction of reducing intercarrier compensation rates down to cost-justified levels, or, at least, excluding Internet-based communications from the insupportable regime.

one except their own immediate shareholders. The Commission must finally realize that it is the ILECs that are manipulating the system so that they maximize intercarrier compensation revenues and minimize intercarrier compensation payments. It is the incumbents that are improperly gaming the system to their exclusive advantage and at the expense of innovation, competition, consumers and the broader public good.

All users (new technology and old technology) can benefit from the network effects created by interconnecting and interoperating the Internet and the PSTN in the most technologically and economically efficient manner. Legacy “TDM” no longer represents technological efficiency by any means. It is absurd that the controllers of the narrowband PSTN should be entitled to extract supra-competitive revenue purely because they have limited their own users to narrowband access. It simply makes no public policy sense to allow narrowband PSTN providers to prevent their customers from fully participating in the Internet communications revolution. Access by or to narrowband customers is not so special and so qualitatively better than access by or to broadband Internet users that LECs should be entitled to payment for a “call” that is free when both users are on broadband. Even more absurd is the fact that the telcos are trying to force payment when the quality is actually *inferior* to the Internet-based free communication. Public policy should ensure that narrowband customers are allowed to participate in

the network effects and the evolutionary and revolutionary consequences of Internet-based communications.

XI. LEC Interconnection Behavior Violates Net Neutrality and Interconnection Policy

A provider of basic infrastructure – say a railroad or a telecommunications network – will often seek some share of the available rents from the goods or services carried on its platform. Without regulatory oversight, or countervailing monopoly power on the part of the goods manufacturer (as Standard Oil enjoyed as to oil), the railroad companies were renowned (and detested) for charging supra-competitive prices that limited the potential profits available to the farmers whose goods were shipped via their platform. This is a classic “hold-up” strategy by any transit provider in demanding a supra-competitive, non-cost-based fee for interconnection and traffic exchange.⁵³

At least some policymakers still recall that, in the 1950s, AT&T sought to monopolize entirely the provision of goods that worked in conjunction with its network, by opposing “foreign attachments” and claiming for itself the sole right to charge (supra-competitive rents) for applications (say, telephones)

⁵³ See Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM L. REV. 1323, 1330–40 (1998); James C. Bonbright, *PRINCIPLES OF PUBLIC UTILITY RATES* 83 (1961).

that connected to the network.⁵⁴ And even more of us must remember that, during the antitrust litigation between the U.S. DOJ and the consolidated AT&T system in the 1970s and 1980s that led to the Modification of Final Judgment, then-Attorney General Bill Baxter explained what is now known as “Baxter’s Law”: a platform provider subject to price regulation has a powerful incentive to control the applications market in an effort to recoup monopoly rents denied to it by price regulation of the platform.⁵⁵

A platform provider subject to price regulation has a powerful incentive to control the applications market in an effort to recoup monopoly rents denied to it by price regulation of the platform. In the context of Internet-PSTN interconnection, network providers with such control of the applications that ride the network have the power to turn any unaffiliated application into “damaged goods” by asserting that such applications and services must pay the highest possible rate to communicate with the PSTN merely because it is “different” from its preferred application.

XII. What the FCC Does with Internet Voice Policy Shall Likely Set the Agenda for all Internet Communications Applications

⁵⁴ See *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956) (rejecting an attempt by AT&T to invoke a tariff banning foreign attachments).

⁵⁵ See Joseph Farrell & Philip J. Weiser, Modularity, Vertical Integration and Open Access Policies: Towards A Convergence of Antitrust and Regulation in The Internet Age, 17 HARV. J. L. & TECH. 85, 129 (2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=452220.

If the telcos/Internet Access Providers are allowed to charge the Internet application providers when a communication to the carriers' customer includes a voice application, we will have opened the door to allowing carriers to charge Internet application providers for all user communications (be they voice, video, data or other). For now, the telcos claim that there are historic and current qualitative distinctions between voice and other communications that require disparate regulatory treatment for voice. This is a technologically unsustainable charade based on the legacy distinctions between voice and other services. In an Internet-enabled world, this distinction cannot persist, and when regulators recognize that the distinction cannot persist, it will be much easier for the access providers to segue into charging for all communications if they have their foot in the door and a regulatory conclusion that Internet-delivered voice is subject to access charges by the access provider.

The better principle is simply to give the user the paid for capacity, and let the user determine how best to use and control their Internet access.

In any event, FeatureGroup IP asks that the FCC hold the line here and now. If the Access Providers succeed in extracting usurious per minute access revenue from Internet Application Providers when the communication includes a "voice component", there is no reason the logic won't apply to all communications when a bit is truly recognized to be just a bit. Internet Application Providers need bargaining leverage against the Access Providers

in order to realize the full promise of the broadband Internet experience, and allowing the Access Providers to win this first battle will send the industry and the Internet down a path in which the Access Providers will have all the leverage.

If access charges are allowed to be assessed unilaterally by phone companies upon Internet Application Providers for communications to the PSTN, it will raise the cost to broadband users who want to talk with their analog counterparts – thus putting a toll booth on the digital transition.

With regard to free services and applications, this could mean the difference between whether the services can even be economically offered to consumers.

XIII. The Commission Should Adopt Modern, Forward-Looking Interconnection Principles that Facilitate Efficient and Cost-Based Interoperation Between the Legacy PSTN and the Internet.

A. Introduction.

“What we have here is a failure to communicate. Some men you just can’t reach...”⁵⁶

“Communication”: c.1384, from O.Fr. *communicacion*, from L. *communicationem* (nom. *communicatio*), from *communicare* “to impart, share,” lit. “to make common,” from *communis* (see common).⁵⁷

‘Information,’ we observed, is derived from the verb inform, which is related to the verb “form.” To inform is not to “deliver information,” but

⁵⁶ Strother Martin as Captain, Road Prison 36 in “Cool Hand Luke” © Warner Brothers/Seven Arts (1967).

⁵⁷ Online Etymology Dictionary, available at <http://www.etymonline.com/index.php?term=communication>.

rather to form the other party. If you tell me something I didn't know before, I am changed by that. If I believe you, and value what you say, I have granted you authority. Meaning, I have given you the right to author what I know. Therefore, we are all authors of each other. This is a profoundly human condition in any case, but it is an especially important aspect of the open source value system. By forming each other, as we also form useful software, we are making the world. Not merely changing it.⁵⁸

inter-

pref.

Between; among: international.

In the midst of; within: intertropical.

Mutual; mutually: interrelate.

Reciprocal; reciprocally: intermingle.⁵⁹

connect

v. con nect ed, con nect ing, con nects

v. tr.

To join or fasten together.

To associate or consider as related: no reason to connect the two events. See Synonyms at join.

To join to or by means of a communications circuit: Please connect me to the number in San Diego. Her computer is connected to the Internet.

To plug in (an electrical cord or device) to an outlet.⁶⁰

We sometimes forget the real meaning and derivation of the words we use. Those in the “communications” industry are here to facilitate people’s ability to *communicate*.⁶¹ The roots of that word are “*co*” (“together,” “shared,” “common”) and the Latin word “*-mutus*” (as in “done in exchange,”

⁵⁸ Doc Searls’ IT Garage, “Rolling into 2006” (December 22, 2005) available at <http://www.itgarage.com/node/725>.

⁵⁹ “inter-.” Dictionary.com. The American Heritage® Dictionary of the English Language, Fourth Edition. Houghton Mifflin Company, 2004. <http://dictionary.reference.com/browse/inter-> (accessed: February 06, 2008).

⁶⁰ “connect.” Dictionary.com. The American Heritage® Dictionary of the English Language, Fourth Edition. Houghton Mifflin Company, 2004. <http://dictionary.reference.com/browse/connect> (accessed: February 06, 2008).

⁶¹ Attribution is due to Sara C. Wedeman, PhD of the Behavioral Economics Consulting Group (becg-llc.com) for her insight and presentation of the etymology behind and often forgotten meaning of the term “communicate.” This paragraph is primarily based on her work.

“borrowed,” reciprocal,” “mutual” (Latin), the Sanskrit “-*mitra*,” (“friend,” “friendship”)⁶² and the similar Indo-European “*mei-*.”⁶³ “*Communicate*” connotes “mutuality of exchange, reciprocity, with a “safety net” of friendship (or at least good will) and a certain level of trust.⁶⁴

Individuals who are *communicating* exchange *information*. This is not a passive activity, and the communicants do not just “deliver” or “receive” that information; the knowledge that is gained on each side actually *informs* and *transforms* both parties. *Each* side benefits and derives value.

When the communicants are not on the same “network”, the conversation can only occur if their respective networks directly or indirectly *interconnect* in a way that would support the information exchange. Like “*co-*” the prefix “*inter-*” implies *mutuality* and *reciprocity*. And the base “*connect*”

⁶² “mitra,” *The American Heritage® Dictionary of the English Language*, Fourth Edition, Houghton Mifflin, 2000, <http://www.bartleby.com/61/14/M0351450.html> (accessed February 7, 2008).

⁶³ “mei” *The American Heritage® Dictionary of the English Language*, Fourth Edition, Houghton Mifflin, 2000, <http://www.bartleby.com/61/roots/IE309.html> (accessed February 7, 2008).

⁶⁴ See also “communicate” *The American Heritage® Dictionary of the English Language*, Fourth Edition, Houghton Mifflin, 2000 <http://www.bartleby.com/61/78/C0517800.html> (accessed February 7, 2008). Similar connotation is gleaned by considering the meaning and roots of the term “dialog” as expressed by philosopher Martin Buber in *I and Thou* (“*Ich und Du*”, 1923), translated by Ronald Gregor Smith (New York, Charles Scribner’s Sons, 1958). The roots of “dialog” are “*dia-*” which means “including or between two parties”, and “*-logue*,” from the Greek “*logos*”, which means “word” or “speak”). “Dialogue” *The American Heritage® Dictionary of the English Language*, Fourth Edition, Houghton Mifflin, 2000 <http://www.bartleby.com/61/59/D0195900.html> (accessed February 7, 2008); “dialog,” Dictionary.com. *The American Heritage® Dictionary of the English Language*, Fourth Edition. Houghton Mifflin Company, 2004. <http://dictionary.reference.com/browse/dialog> (accessed: February 07, 2008); “*dia-*,” Dictionary.com, *The American Heritage® Dictionary of the English Language*, Fourth Edition. Houghton Mifflin Company, 2004. <http://dictionary.reference.com/browse/dia-> (accessed: February 07, 2008); “*-logue*,” Dictionary.com, *The American Heritage® Dictionary of the English Language*, Fourth Edition. Houghton Mifflin Company, 2004. <http://dictionary.reference.com/browse/-logue> (accessed: February 07, 2008).

means “to *join*” or “to *associate*” or – as the FCC’s rules directly state – to “*link*.”⁶⁵ Interconnection and interoperation are necessary conditions in a world where the “network” is not completely owned by one party, who has total control over both the services and applications that will be run on top of the physical network and the devices that attach to that network.

When Congress voted for competition, it necessarily also intended that all networks cooperate, interconnect and interoperate in as seamless a manner as possible. But that cannot mean that one network – here the PSTN – can or should be allowed to dictate the terms or technical specifics. Indeed, it would be entirely ridiculous for that to occur, because the PSTN is the older and less capable, and it cannot really “see” what happens at the higher layers of the stack where all the “Internet” functionalities are taking place. To the PSTN, every thing is a basic voice call and it cannot perceive or recognize the magic that runs on top of the “voice network.” The legacy PSTN is absolutely the worst possible candidate for all-powerful dictator of standards and technical aspects of interconnection. Yet, here we are today confronting a request by the telephone companies that multiple Internet standards be overruled and that modern, next-generation networks be mandatorily dumbed-down and hobbled. And that request is accompanied by another demand that the Internet also pay ruinous, above-cost fees as well, even after the dumbing down occurs.

⁶⁵ See 47 C.F.R. § 51.5 (definition of “interconnection”).

In recent years “interconnection” issues have, for the most part, been expressed in terms of technical requirements (including signaling), relative cost burdens and – despite what the FCC rule says – unabated controversy over the charges, if any, that will be assessed for the “transport and termination” of “telecommunications” that flow over the interconnected networks. The public rarely participates, and the matter has been dominated by a closed, insular and self-interested group that does its best to insulate the FCC from the realities of the Internet and technological and business innovation.

The interlocutors for the internecine⁶⁶ combatants in these interconnection debates have been far too focused on their own interests and they have forgotten what this is all about. We are supposed to be working together on a *reciprocal*, *cost-based* and *mutual*⁶⁷ basis to help *form* society by advancing and improving and supporting our society’s ability to *communicate*.

The ILECs, however, are far more interested in gaming intercarrier compensation so that they *never* pay compensation at any level, but instead *always* receive compensation for all traffic – regardless of direction,

⁶⁶ This term is used in the “incorrect” but popular sense described in the “Word History” for this term in *The American Heritage® Dictionary of the English Language*. But the correct usage (“Mutually destructive; ruinous or fatal to both sides”; “Characterized by bloodshed or carnage”, see “internecine.”) could also be applied as well. Dictionary.com. *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2004. <http://dictionary.reference.com/browse/internecine> (accessed: February 06, 2008).

⁶⁷ Sections 201, 251, 252 and 332 command that each of these fundamental principles be applied.

classification or use – at the highest possible access charge rate. And they do not care at all that the traffic they are gaming is “to” or “from” their own users. They wave the universal service/carrier of last resort flag as a justification to not only maintain existing hidden subsidies but to now expand them to include traffic that has always been exempt from access and therefore not a subsidy extraction target. What they completely fail to realize is that the result will not be increased revenues from some previously-unseen “man behind the tree” that can be taxed without any effect on their users.

Their proposals will directly translate into higher prices and fewer communications alternatives for their own customers. They should, however, be a bit more humble about the economic power they can exert over the long term. The day may come when the Internet charges them for the privilege of causing their users’ phone to ring. It is, after all, a far larger network than any ILEC’s part of the PSTN or even the entire PSTN⁶⁸ and it has far more utility. For so long as the ILECs are not allowed to impose their dominion over it merely because they control ingress and egress points, this will continue to be the case. The issue really is not about how much the Internet wants to talk to the PSTN, and how much it will “pay” to do so. The issue is the extent to which the ILECs own narrowband users will be allowed to

⁶⁸ Embarq is woefully mistaken when it claims on page v of its petition for forbearance that “[t]he PSTN provided by LECs like Embarq is the network on which the vast majority of the nation’s traffic will long depend.” The Internet may ride in part on LEC-provided non-PSTN physical layer facilities near the edges, but Internet volume surpassed the PSTN a while back, and while PSTN message traffic is flat or declining the Internet continues to grow.

participate in the Internet and have access to its broader reach and functionality.

The Petition ignores readily available technical solutions that would yield better interconnection, better interoperability and better information. There is a better way.

B. Principles of Interconnection.

The Commission needs to pay as much attention to the technical issues as the rate issues, because – notwithstanding the attempt to separate “technical” from “rate” and the “facilities” from “traffic” – they all interrelate. FeatureGroup IP believes it is time to once again set out what we believe Congress had in mind in 1996, and what still makes sense today.

A. There should be symmetry in any interconnection scheme. The goal should be to encourage and promote two-way traffic, or at least, not to encourage business models that favor one-way traffic delivery based on the current complicated and inconsistent inter-provider compensation schemes.

B. Any interconnection scheme should be cost-based to discourage the ability to arbitrage new technology or to increase the cost of market entry by new technology providers or users. The scheme should encourage the least-cost method of interconnection, should remove incentives for any entity to promote non-cost based methods of interconnection, and all parties should be encouraged to search for the best, most efficient, most economically and most technologically advantageous interface. Any method of interconnection should promote the smallest transaction cost. In a world where traffic flows equally to and from networks and where traffic-sensitive costs are approaching zero, providers do not really need to count minutes any more.

C. Interconnection principles should not favor one technology over another. That is to say, there should be no favoritism based upon application (*e.g.*, voice, chat, text, IM, email, video). In a digital world, all applications are or should be equal. To discriminate among applications would adversely skew the policy principles encouraging convergence.

D. Interconnection principles should not favor one affiliation or one type of provider over another in order to avoid and predatory cross-subsidy.

E. Interconnection should support modern public policy goals including

- a. promotion of network effects;
- b. creation of group forming networks;
- c. encouragement of user choice of technology, providers and applications;
- d. user control over their own communications experience to the fullest extent possible; and
- e. promotion of open network concepts that enable and welcome technological and social improvements regardless of source.

F. Interconnection should support historical public policy goals while subsidies move from application to network support.

- i. Internet-based communications, if allowed to evolve and serve users without subjugation to legacy access charge rules, could dramatically ease the burden on the Universal Service Fund (VoIP could be a near free alternative for traditional voice telephony if we allow it);
- ii. current ILEC distribution of voice is economically 10 to 15 times more expensive to provide when compared to IP and Mobile voice;
- iii. IP and Mobile voice have more benefits to those USF is supposed to help;
- iv. allowing alternative providers to fulfill USF goals and receive subsidies allows investment in new technology;
- v. now that costs to provide service are dramatically lower, prohibit over earning by any recipient of USF; and
- vi. prohibit distribution of USF to any entity or affiliated entity that does not also explicitly support

Modern Public Policy Goals (*e.g.*, if a telco blocks VoIP or other Internet traffic, that telco cannot receive a subsidy).

Surely we can all at least agree that it is important for the telecom and Internet industries to develop an interconnection regime that creates a mutually virtuous cycle for the carrier, for the application provider, for the consumer and for society-at-large. FeatureGroup IP has yet to see any attempt to present a legal and policy argument that would justify arrangements that do not reflect legitimate costs and are not reciprocal in nature. But that is exactly what the ILECs want.

All Americans, including ILEC customers, should be able to realize what happens when different networks interconnect and interoperate. All users should be able to share the value that accrues from the combination of Reed's and Metcalf's law, but that can only be achieved when we create a ubiquitous, interoperable and seamlessly interconnected "network of networks" and one network does not preponderate over the others by demanding non-reciprocal, arbitrage-creating, technology-debilitating rents to all others merely so they can all intercommunicate. In an Internet-enabled world, consumers of narrowband PSTN service should not be precluded from fully participating in the digital Internet revolution because of what is nothing less than an economic boycott by the cartel of incumbent telephone companies that are holding their own users hostage.

XIV. Conclusion

For the forgoing reasons, as well as the reasons set forth in the FeatureGroup IP Forbearance Petition, we ask that the FCC grant the petition of FeatureGroup IP.

Respectfully Submitted,

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Dated: March 14, 2008

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of March, 2008, a true and correct copy of the foregoing Reply Comments of FeatureGroup IP was served electronically on the following:

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